UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G04-30508-REB
JEFFREY HERMAN FROUG,	:	
Debtor.	:	
	:	ADVERSARY PROCEEDING
NADINE BELLOWS f/k/a NADINE FROUG,	:	NO. 05-2009
Plaintiff,	:	
v.	:	CHAPTER 7
JEFFREY HERMAN FROUG,	:	
Defendant.	:	JUDGE BRIZENDINE

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND ORDER AND NOTICE SETTING MATTERS FOR HEARING

Before the Court is the motion of Plaintiff for judgment on the pleadings or, in the alternative, motion for partial summary judgment and motion to stay discovery until entry of final order hereon. At issue herein is the characterization of certain obligations as described in a divorce decree concerning Plaintiff and Defendant-Debtor as alimony, maintenance, or support, which is excepted from discharge under 11 U.S.C. § 523(a)(5), or as a settlement or division of marital property that is subject to discharge. Based upon a review of the arguments of counsel set forth in the extensive briefs and the pleadings and other documents of record, the Court concludes that partial summary judgment should be granted in part as discussed hereafter and other various matters shall be set for hearing.

The undisputed facts are as follows. Plaintiff and Debtor were husband and wife for 17 years and divorced on or about October 2, 1998 as stated in a Marital Settlement Agreement adopted and incorporated into a Final Judgment of Dissolution of Marriage bearing a signature date of October 19, 1998, by the Circuit Court for Broward County, Florida. (Attached as an exhibit to Plaintiff's affidavit filed herein). Among other things, this divorce decree set forth a listing of various provisions regarding an ordering, settling, and disposition of issues related to the parties' marital affairs, support obligations, property rights, and custody of their two children. Subsequently, the Florida state court entered an Order on a Report and Recommendation of General Master on September 9, 2003 addressing unfulfilled obligations under the divorce decree and making various modifications to said obligations, along with entry of an Income Deduction Order. However, since these later orders were entered after the parties had negotiated their original settlement agreement, Debtor disputes their usefulness or relevance for purposes of deciding the issues presented herein. Debtor commenced the above Chapter 7 case by the filing of a bankruptcy petition on October 25, 2004. The two children are currently 19 and 20 years old, respectively.

Under Fed.R.Civ.P. 12(c), incorporated herein pursuant to Fed.R.Bankr.P. 1012, "the Court must grant a motion for judgment on the pleadings where no material issue of fact exists, and when the movant demonstrates it is entitled to judgment as a matter of law." *Mullins v. M.G.D. Graphics Systems Group*, 867 F.Supp. 1578, 1579 (N.D.Ga. 1994); *see also Mathis v. Velsicol Chemical Corp.*, 786 F.Supp. 971, 973 (N.D.Ga. 1991). In addition, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c), applicable herein through

Fed. R. Bankr. P. 7056; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). In deciding whether the moving party has met this burden, all factual inferences reasonably drawn from the evidence presented must be viewed in the light most favorable to the party resisting summary judgment. The Court cannot weigh the evidence or choose between competing inferences. *See Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997); *Raney v. Vinson Guard Serv., Inc.*, 120 F.3d 1192, 1196 (11th Cir. 1997).[1]

A domestic obligation is excepted from discharge if it is in the nature of support and the determination of whether a debt constitutes alimony, maintenance, or support under Section 523(a)(5) is fact intensive and governed by federal law. *See Cummings v. Cummings*, 244 F.3d 1263, 1265 (11th Cir. 2001); *Strickland v. Shannon (In re Strickland)*, 90 F.3d 444, 446 (11th Cir. 1996); *Harrell v. Sharp (In re Harrell)*, 754 F.2d 902, 904 (11th Cir. 1985); *see also Hopson v. Hopson (In re Hopson)*, 218 B.R. 993 (Bankr. N.D.Ga. 1998). Under this subsection, bankruptcy courts do not sit as appellate courts to reconsider amounts awarded, support needs, or fairness of a property division as set forth in a divorce decree or incorporated settlement agreement. Instead, bankruptcy courts must determine the intent of the parties and/or state court in connection with a specific obligation, guided by state law and by considering the entire agreement or decree for purposes of deciding whether same functions as, or is in the nature of, alimony, maintenance, or

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[1] Once the party moving for summary judgment has identified those materials demonstrating the absence of a genuine issue of material fact, the non-moving party cannot rest on mere denials or conclusory allegations, but must go beyond the pleadings and designate, through proper evidence, specific facts showing the existence of a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Johnson v. Fleet Finance, Inc.*, 4 F.3d 946, 948-49 (11th Cir. 1993); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993).

support (which is nondischargeable) or in the nature of a property settlement. *Cummings*, 244 F.3d 1263; *see also In re Bamman*, 239 B.R. 560, 562 (Bankr. W.D.Mo. 1999); *Robinson v. Robinson (In re Robinson)*, 193 B.R. 367 (Bankr. N.D.Ga. 1996). In addition to the characterization of the obligation in the divorce decree or agreement itself, bankruptcy courts consider numerous other factors to determine the intended function of the parties and/or divorce court in connection with the obligation in question. *See e.g. In re Rappleye*, 210 B.R. 336, 340 (Bankr. W.D.Mo. 1997). Further, collateral estoppel does not preclude the Court from examining the award in question under Section 523(a)(5) because the issue of dischargeability could not have been before the state court since the bankruptcy petition had yet to be filed.[2]

Based upon a review of the pleadings, the Court makes the following conclusions. First, it appears that, although the real property award (marital home) (*see* ¶ 6 of Marital Settlement Agreement) of Debtor's undivided one-half interest to Plaintiff is not at issue herein, such provision may be relevant to the parties' dispute regarding the nature of Debtor's agreement to pay the second mortgage thereon and to hold Plaintiff harmless from same. Plaintiff maintains these payments helped bridge the gap between her income and expenses so that she and the children could continue residing in the home. In response, Debtor contends that because the obligation was for a fixed term or lump sum upon sale of the marital residence, the payments were intended to increase Plaintiff's equity and constitutes a division of property rather than support. Although such lump sum (albeit payable in installment) obligations and hold harmless agreements can lie in the

[2] Under Georgia law, collateral estoppel is appropriate if the following are shown: (1) identity of parties; (2) identity of issues; (3) actual and final litigation of the issue(s); (4) essentiality of the prior adjudication; and (5) full and fair opportunity to litigate the issue(s). *See Lusk v. Williams (In re Williams)*, 282 B.R. 267, 272 (Bankr. N.D.Ga. 2002) (cites omitted). This standard is similar under Florida law. *See Lasky v. Itzler (In re Itzler)*, 247 B.R. 546, 550 (Bankr. S.D.Fla.. 2000).

nature of support, the record presented is unclear given the structuring, conditions, and terms of payment and this issue is not appropriate for disposition by summary judgment. *Compare Nelson v. Mader (In re Mader)*, 228 B.R. 787, 790 (Bankr. M.D.Fla. 1998). Hence, after careful review, the Court concludes that a genuine issue of material fact remains concerning the characterization of this obligation in terms of the parties' intent for purposes of Section 523(a)(5).

Next, the parties disagree concerning the intention of the payments set forth as alimony in ¶ 11 as Plaintiff points to its designation in the agreement, its termination upon death or remarriage, and respective tax treatment by each party. On the other hand, Debtor questions the support nature of the totality of such payments given the 'extravagant lifestyle' represented thereby (regarding the difference between $3,000 to $5,400 per month). Further, Debtor advocates the function of said additional amount as a "blackmail premium," compensation for "marital waste," a "penalty payment," and division of property based on their "non-modifiable" character. Applying traditional factors for analyzing such payments, however, the Court concludes that no genuine fact issue exists concerning their nature as support given that they are "rehabilitative alimony" based on the following: Plaintiff's income disparity relative to Debtor, the fact that said payments 'terminate upon death or remarriage' of Plaintiff, custody of minor children rested in the Plaintiff, the manner of their enforcement, and the fact that Plaintiff treated such payments as income on her tax returns while Debtor took tax deductions regarding same, all of which are indicative of intent. *Compare Smith v. Edwards (In re Smith)*, 207 B.R. 289 (Bankr. M.D.Fla. 1997); *see also Burgess v. Henrie (In re Henrie)*, 235 B.R. 113, 118 (Bankr. M.D.Fla. 1999); *and compare Robb-Fulton v. Robb (In re Robb)*, 23 F.3d 895 (4th Cir. 1994).[3]

[3] As previously mentioned, the Court should not and indeed cannot revisit the terms of the divorce agreement to the degree advocated by Debtor as in retrying the question of

The provisions relating to child support (¶ 14), maintenance of health insurance for the children, and maintenance of life insurance and disability insurance by Debtor (¶ 18) do not appear to be disputed, though Debtor disputes children's medical care expenses to the extent same appears as an indefinite obligation (¶ 15). With regard to the obligations related to medical coverage, the Court concludes that same are nondischargeable as they are clearly intended for the benefit of the parties' children. *Compare Robinson*, 193 B.R. at 376. Further, the parties disagree concerning the proper characterization of "additional expenses for the children" including Prepaid College Tuition Program payments and other college-related expenses (¶ 16). Debtor contends this provision means that the parties intended their children to attend college in Florida, and that both Debtor and Plaintiff would contribute to the payment of expenses associated therewith. The Court concludes that Debtor's obligation to pay college expenses for the children is in the nature of alimony, maintenance, and support. An issue of fact does appear to exist regarding the intended amount or extent of said obligation as in the case of the actual costs confronted herein resulting from the attendance of school out of state, but the issue of the interpretation of the extent of Debtor's obligation under this provision should be decided by the appropriate Florida state court.

Finally, Debtor disputes any obligation to pay interest on any of the above obligations and the obligation to pay Plaintiff's attorney's fees of $50,000 (¶ 20). Upon review of such obligations, the Court concludes that the legal fees are in the nature of support and excepted from discharge as they are reflective of relative need and connected with the support obligation. *Compare* Fla. Stat.

Plaintiff's need for alimony, issues pertaining to marital waste payments, and allegations of blackmail. This Court's inquiry is strictly limited to analyzing the obligations in question for purposes of dischargeability. Further, the matters Debtor attempts to introduce were before the state courts for decision in connection with the original divorce decree and settlement agreement between the parties.

Ann § 61.16 (fees and suit monies); *see also Person v. Karell (In re Karell)*, 200 B.R. 700 (Bankr. N.D.Ga. 1995). In addition, interest on support awards, including their enforcement, is provided by Florida statute. *See* Fla. Stat. Ann. §§ 55.03, 61.17.

Based upon the above reasons, the Court concludes that based upon the record presented that Plaintiff is entitled to summary judgment to the extent provided herein.

Accordingly, it is

ORDERED that Plaintiff's motion for partial summary judgment be, and hereby is, **granted in part** to the extent that the obligations set forth in a Marital Settlement Agreement, adopted and incorporated into a Final Judgment of Dissolution of Marriage bearing a signature date of October 19, 1998, by the Circuit Court for Broward County, Florida, and styled *In re: The Marriage of Nadine Bellows Froug and Jeffrey Herman Froug*, Case No. FMCE 97-7369 (41/91), are **excepted** from discharge and same are **nondischargeable** under 11 U.S.C. § 523(a)(5) as follows: the provisions relating to Spousal Support of Wife (Alimony) (¶ 11 of Marital Settlement Agreement); Child Support (¶ 14); Additional Expenses for the Children (college expenses including Prepaid College Tuition Program payments) (¶ 16, 9(d)(ii)), with the extent of same to be determined by the state court; Medical Care of Children, including medical expenses and maintenance of health insurance for the children (¶ 15); maintenance of life insurance and disability insurance by Debtor (¶ 18); associated legal fees of $50,000.00 (¶ 20); and statutory interest.

Prior to addressing the dischargeability issue concerning the payments with respect to the second mortgage (¶ 6(c)) under Section 523(a)(5) and/or (a)(15), if necessary, it appears to the Court, for purposes of judicial economy, that the Court's consideration of this issue should be delayed until the appropriate Florida state court decides the extent of Debtor's obligation to pay

the college expenses of the two children of the marriage. This Court will, therefore, set for hearing Plaintiff's previously filed motion for relief from the automatic stay to consider Plaintiff's prayer to modify the stay to allow Plaintiff to proceed in Florida state court. The Court will also hear at that time Plaintiff's request for vacation of the Escrow Order of May 13, 2005 to allow application of the escrowed amounts to any indebtedness declared nondischargeable and to apply incoming income deduction payments to said obligations. At this hearing, counsel for Plaintiff and for Debtor should be prepared to address any matters pertaining to further discovery or postponement of same, and to address the necessity of having a trial regarding the indebtedness due to the Bar Mitzvah photographer and Discover card, and finally, to address any issues concerning attorney's fees incurred subsequent to entry of the divorce decree. Thus, it is

FURTHER ORDERED AND NOTICE IS HEREBY GIVEN that a hearing will be held to consider said matters at _____ **o'clock .m. on the ___ day of _____, 2005, in Courtroom 1202, United States Courthouse, 75 Spring Street, S.W., Atlanta, Georgia**.

The Clerk is directed to serve a copy of this Order upon Plaintiff's counsel, counsel for Debtor-Defendant, the Chapter 7 Trustee, and the U.S. Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this _____ day of August, 2005.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE